Petition No. 102047-3

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

COURT OF APPEALS NO. 38152-8-III

DANIEL CAMPEAU, individually and
on behalf of all others similarly situated,
Petitioner/Plaintiff,

v.

YAKIMA HMA, LLC, a Washington corporation,
Respondent/Defendant,

AMICI CURIAE MEMORANDUM BY WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION, PUBLIC JUSTICE, AND TOWARDS JUSTICE

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I. IDENTITY AND INTEREST OF AMICI CURIAE

The Washington Employment Lawyers Association ("WELA") is an organization of approximately 200 lawyers in Washington. WELA advocates in favor of employee rights in recognition that employment with dignity and fairness is fundamental to the quality of life. WELA's members frequently represent employees seeking to recover unpaid wages in both individual and class actions. WELA members have an interest in ensuring that employees who are members of proposed classes do not lose their wage claims because class certification is denied.

Public Justice is a legal advocacy organization that specializes in precedent setting, socially significant civil litigation, with a focus on fighting corporate and governmental misconduct. The organization maintains an Access to Justice Project that pursues litigation and advocacy efforts to remove procedural obstacles that unduly restrict the ability of workers, consumers,

and people whose civil rights have been violated to seek redress for their injuries in the civil court system. As part of its Access to Justice Project, Public Justice has appeared before courts across the country, both as counsel for parties and as *amicus curiae* in cases presenting important issues regarding Rule 23 class actions, including filing a recent amicus brief in *DeFries v. Union Pacific Railroad Co.*, a pending Ninth Circuit case involving *American Pipe* tolling.

Towards Justice ("TJ") is a non-profit law firm that seeks to advance economic justice through impact litigation, strategic policy advocacy, and collaboration with workers, community groups, and governmental agencies. TJ represents and advocates for low-wage and exploited workers nationwide. TJ engages in legislative and policy advocacy at the state level, including but not limited to ensuring that state laws provide worker protections above and beyond the minimums set by federal law.

II. INTRODUCTION AND STATEMENT OF THE CASE

This Court should accept review to decide whether Division III erred in ruling that the tolling doctrine first adopted in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974), does not apply in Washington. For nearly 50 years, workers and consumers who are absent members of proposed classes have relied on *American Pipe* to bring forward their substantive claims after a procedural ruling denying class certification under CR 23. Division III's sweeping decision in *Campeau* upends that regime and is contrary to this Court's precedent, Washington public policy, and decisions of state high courts across the country. Amici request that the Court grant Mr. Campeau's petition for review because *Campeau* raises a question of substantial public importance and conflicts with this Court's precedents.

In 2015, Daniel Campeau's union, the Washington State Nurses Association ("WSNA"), filed a lawsuit alleging wage and

hour violations. After a nine-day bench trial, the court awarded WSNA over $1.4 million in unpaid wages. But in 2020 this Court vacated the judgment and dismissed the case because WSNA lacked associational standing. *Wash. State Nurses Ass'n v. Cmty. Health Sys., Inc*. 196 Wn.2d 409, 426, 469 P.3d 300 (2020). Within months, Campeau filed a proposed class action, making the same wage claims WSNA had made. On a petition for discretionary review, Division III of the Washington Court of Appeals reversed the trial court's denial of the hospital's motion to dismiss. Division III held that *American Pipe* tolling does not apply in Washington and that the statute of limitations had run before Campeau filed suit. The court dismissed Campeau's wage claims.

III. ARGUMENT

A. Campeau's petition raises issues of substantial public interest that should be decided by the Supreme Court.

1. Without *American Pipe* tolling it will be harder for Washington workers to recover unpaid wages and for consumers hoodwinked by unfair or deceptive business practices to obtain relief.

Whether *American Pipe* tolling applies in Washington has significant public policy ramifications. In *American Pipe*, the United States Supreme Court held that the "commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 554. Once the statute of limitations has been tolled, "it remains tolled for all members of the putative class until class certification is denied." *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 354, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983). "At that point, class members may choose to file their own suits or to intervene as plaintiffs in the pending action." *Id. American Pipe*

tolling furthers the purposes of representative suits, which are "designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions." *American Pipe*, 414 U.S. at 550.

This Court has recognized that class actions are an essential tool for enforcement of Washington's public policy favoring payment of employee wages and vindication of consumer rights. *See, e.g., Chavez v. Our Lady of Lourdes Hosp. at Pasco*, 190 Wn.2d 507, 523, 415 P.3d 224 (2018) (reversing denial of class certification of nurses' claims for unpaid wages and rejecting Division III's suggestion that individual claims filed in small claims court would be superior to a class action); *Dix v. ICT Grp., Inc.*, 160 Wn.2d 826, 1022, 161 P.3d 1016 (2007) ("class suits are an important tool for carrying out the dual enforcement scheme of the [Consumer Protection Act]"); *Shilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 157, 961 P.2d 371 (1998) ("The Legislature has evidenced a strong public policy in favor of payment of wages due employees").

American Pipe tolling serves those policies by protecting the substantive claims of workers or consumers on whose behalf a class action is initially filed, even if the court ultimately determines that the Civil Rule 23 requirements are not met. Discarding this well-established doctrine would frustrate the principal functions of Rule 23 by encouraging individual class members to intervene or act before the running of the statute of limitations on their individual claims. Consumers and workers who are absent members of proposed classes would likely struggle to even find lawyers willing to file protective individual actions that may ultimately be subsumed in a successful class action because it would not be economically viable to make a practice of filing such actions. If allowed to stand, Division III's holding will undermine the claims of Washington residents involved in representative suits.

Division III's decision that *American Pipe* tolling does not apply in Washington thus "involves an issue of substantial public

interest that should be determined by the Supreme Court" under Rule of Appellate Procedure 13.4(b)(4).

2. The Court of Appeals' rejection of *American Pipe* tolling puts Washington out of step with other states and public policy trends.

Most states that have considered the issue have adopted *American Pipe*'s tolling rule. *See, e.g., Nolan v. Sea Airmotive, Inc.,* 627 P.2d 1035, 1041 (Alaska 1981) (adopting *American Pipe* "in light of the identity between [Alaska's] Civil Rule 23 and the corresponding federal rule."); *Grimes v. Hous. Auth. of the City of New Haven*, 242 Conn. 236, 243, 698 A.2d 302, 306 (1997) ("we now adopt the rule set forth in *American Pipe & Construction Co.* with respect to the tolling of statute of limitations for the purported members of a class action."); *Levi v. Univ. of Hawaii*, 67 Haw. 90, 93, 679 P.2d 129, 132 (1984) ("We therefore adopt the rule enunciated in *American Pipe* . . . "); *First Baptist Church of Citronelle v. Citronelle-Mobile Gathering, Inc.,* 409 So. 2d 727, 729 (Ala.1982); *Jolly v. Eli Lilly & Co.,* 44 Cal. 3d 1103, 1118, 751

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Campeau's rejection of *American Pipe* puts Washington out of step with its sister states. Whether Washington departs from a doctrine widely accepted in other jurisdictions is an issue of substantial public importance that should be decided by the Supreme Court under Rule of Appellate Procedure 13.4(b)(4).

The substantial public importance of whether a state recognizes *American Pipe* tolling is also reflected in federal

appellate orders certifying that question to state high courts. *See, e.g., Albano v. Shea Homes Ltd. P'ship*, 634 F.3d 524 (9th Cir. 2011) (certifying question about applicability of *American Pipe* tolling to claims subject to a statute of repose to Arizona Supreme Court), *certified question answered*, 227 Ariz. 121, 254 P.3d 360 (2011); *Chavez v. Occidental Chemical Corp.*, 933 F.3d 186, 190 (2d Cir. 2019) (certifying question to New York Court of Appeals regarding applicability of cross-jurisdictional class action tolling that parties argued related to *American Pipe* tolling).

B. Division III's ruling conflicts with earlier decisions of this Court.

1. *Campeau* conflicts with this Court's decision in *Pickett v. Holland America*.

Division III's ruling in *Campeau* conflicts with this Court's decision in *Pickett v. Holland America Line-Westours, Inc.*, 145 Wn.2d 178, 35 P.3d 351 (2001). In *Pickett*, this Court considered an objector's challenge to the trial court's final approval of a class action settlement. In analyzing the risk of continued litigation in

the absence of settlement, this Court explained that the objectors' arguments based on *American Pipe* tolling were overbroad. *Id.* at 194. But instead of ruling that *American Pipe* did not apply generally, this Court stated: "Thus, the filing of a class action lawsuit, as one that is representative in nature, preserves the claims of only those persons whose claims were not time barred at the time the class suit was filed." *Id.* at 194–95. This Court recognized that *American Pipe* tolling does apply in Washington even if the doctrine did not cover the claims at issue in *Pickett*. *See also Mix v. Ocwen Loan Servicing, LLC*, No. C17-0699JLR, 2017 WL 5549795, at *5 (W.D. Wash. Nov. 17, 2017) (characterizing *Pickett* as addressing *American Pipe* but not whether cross-jurisdictional tolling applies); *Burch v. Qwest Commc'ns Int'l, Inc.,* No. CIV.06-3523 MJD/AJB, 2010 WL 529427, at *6 n.1 (D. Minn. Feb. 4, 2010) (citing *Pickett* for the principle that Washington has adopted *American Pipe* tolling).

Division III's holding in *Campeau* cannot be reconciled with *Pickett* and thus conflicts with an earlier decision of this Court, warranting review under RAP 13.4(b)(1).

2. The Court of Appeals misread this Court's decision in *Fowler v. Guerin.*

Division III held there is no *American Pipe* tolling in Washington based on its understanding of *Fowler v. Guerin*, 200 Wash. 2d 110, 119, 515 P.3d 502 (2022). In *Fowler*, this Court stated that one of the predicates for equitable tolling in Washington is "bad faith, deception, or false assurances by the defendant. " *Id.* at 506. The *Campeau* court reasoned that because *American Pipe* tolling does not require a showing of bad faith, it cannot apply in Washington. *Campeau*, 528 P.3d at 859.

In *Fowler*, the Court warned against the overbroad application of traditional equitable tolling, given the salutary policies that statutes of limitations embody. 200 Wn.2d at 118-19. But *American Pipe* tolling does not raise the same types of

concerns about notice, preservation of evidence, and unfair surprise that traditional equitable tolling can raise. In any case where *American Pipe* may toll the statute of limitations, the filing of a proposed class action put the defendant on notice of the adversarial claims at issue before the running of the applicable limitations period. As the United States Supreme Court explained, the filing of a proposed class action "notifies the defendants not only of the substantive claims being brought against them but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." *American Pipe,* 414 U.S. at 555. Because defendants are already on notice of the potential claims, there is no risk that defendants will be burdened by litigating claims for which relevant evidence has been lost. *See Fowler*, 200 Wn.2d at 118–19. Nothing in *Fowler* compels the wholesale rejection of *American Pipe* tolling.

Indeed, *Fowler* acknowledges the relaxed tolling standard that applies when prisoners file personal restraint petitions. *Id.* at

123. Just as this Court has followed federal courts in adopting a rule more protective of incarcerated persons seeking judicial redress, it may follow federal courts in adopting *American Pipe* tolling to allow workers and consumers to pursue individual claims after a proposed class action is not certified or is decertified. But regardless of how the Court ultimately rules on the question, the availability of *American Pipe* tolling is sufficiently important to merit this Court's review.

IV. CONCLUSION

For all the foregoing reasons, the amici respectfully request that the Court grant Campeau's petition for review.

V. RAP 18.17(B) CERTIFICATION

I hereby certify that this brief contains 2,167 words in compliance with Rap 18.17(b) and RAP 18.17(c)(11).

RESPECTFULLY SUBMITTED AND DATED this 31st day of July, 2023.

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